

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of North Gualala Water Company
For Authority to Implement a Water Rate
Surcharge to Recover Costs Associated with the
Extraordinary Events Memorandum Account
(Source of Supply Study).

Application 01-10-020
(Filed October 19, 2001)

**AMENDMENT TO JANUARY 28, 2002, SCOPING MEMO
AND RULING OF ASSIGNED COMMISSIONER**

Summary

This ruling amends the scoping memo for this proceeding to remove application of the ex parte rules to Arthur B. Jarrett (Jarrett) of the Commission's Water Division.

Background

The January 28, 2002, scoping memo ruled that the ex parte provisions of Pub. Util. Code §§ 1701.1(c)(4) and 1701.3(c)¹, as implemented by Rule 7 of the Commission's Rules of Practice and Procedure², shall apply in this ratesetting

¹ Pub. Util. Code § 1701.1(c)(4) defines ex parte communications. Section 1701.3(c) prohibits oral ex parte communications in ratesetting proceedings unless they conform to the requirements of the statute. Oral ex parte communications with Commissioners in ratesetting proceedings may be made only after three days' notice and an invitation to all other parties; if a Commission grants one party a private meeting, the Commission must offer equal time to every other party.

² Unless otherwise indicated, all subsequent citations to rules refer to the Rules of Practice and Procedure, which are codified at Chapter 1, Division 1 of Title 20 of the California Code of Regulations.

proceeding to the utility and its counsel, to counsel for Water Division staff and to three Water Division staff members, Jarrett, Fred L. Curry (Curry), and Peter T. K. Liu (Liu). The scoping memo authorized comments on application of the ex parte rules to these staff. Water Division filed comments on February 7, 2002, and the utility filed reply comments on February 17.

Discussion

The scoping memo based application of the ratesetting ex parte rules to Curry, Jarrett and Liu on three facts: (1) Water Division's Notice of Intent to Participate (Notice) asked that these three individuals be placed on the service list; (2) although Curry and Jarrett were not present at the prehearing conference (PHC), Liu and staff counsel deferred matters raised in the course of the PHC to Curry and/or Jarrett; and (3) at the PHC Water Division stated that a meet-and-confer with the utility could not occur until Curry and Jarrett were available.

Water Division represents that the ex parte ruling is overly broad to the extent it applies to Curry and Jarrett. Water Division argues that neither Jarrett nor Curry "will be actively involved in developing the Water Division's position on this application, nor are they expected to testify in this proceeding."

(Comments at 2 and attached Declaration of Izetta Jackson, Interim Director of the Water Division.) The utility's comments counter by retracing some of the procedural history that lead to the filing of this application and make various arguments against any change in the scoping memo. The utility alleges that Curry and Jarrett have "long been aware of the Source of Supply Study and related cost recovery at issue" in this proceeding and that both were involved in the review and rejection of the advice letter the utility prepared before filing this application. (Reply comments at 5 and attached Declaration of Sara Steck Myers, Counsel for North Gualala Water Company.)

The issue for the Commission, however, is what roles have Curry or Jarrett actually played since this formal proceeding commenced?³

The utility's position, that knowledge of and involvement in an advice letter process must bar staff from thereafter assuming an advisory position if the matter is elevated to a formal proceeding, lacks legal support. Furthermore, such a constraint would interfere unacceptably with the Commission's ability to utilize its limited staff resources effectively and efficiently. But this is not to say that advisory and advocacy roles are totally interchangeable. In my opinion Water Division correctly summarizes the purpose of the ex parte rules, as follows:

³ Rule 7(a) provides that ex parte rules apply from the *beginning* of a proceeding and states, in relevant part:

The requirements of this subsection shall apply to ex parte communications during the period between the beginning of a proceeding and the determination of the category of that proceeding, including the decision by the Commission on any appeal of such determination. After determination of the category, the requirements of subsection (b), (c), or (d) of this rule shall apply, as appropriate.

(1) In a proceeding initiated by application filed after January 1, 1998, the requirements of subsection (c) shall apply during the period during the filing and the Commission's preliminary determination of category pursuant to Rule 6(a)(1), after which the requirements of subsection (b), (c), or (d) shall apply, depending on the preliminary determination. After the assigned Commissioner's appealable determination of category under Rule 6(a)(3), the applicable requirements shall depend on such determination unless and until it is modified by the Commission pursuant to Rule 6.4 or 6.5(a).

....

The ex parte rules were not intended, nor should they be construed, to taint or disqualify the entire industry division. Rather, *they are to be applied to the individual involved in and responsible for the development of the division's position.* (Comments at 2, emphasis added.)

I believe three events following the filing of the utility's amendment (October 19, 2001) must be considered in determining how the Commission should apply the ex parte rules in this proceeding: (1) Water Division filed its December 4, 2001, Notice; 2) Curry signed the Water Division data request tendered to the utility on January 16, 2002; and 3) Curry attended the meet-and-confer with the utility ordered at the PHC. I discuss each event below.

Water Division's December 4, 2001, Notice. I agree with Water Division that the fact that the service list includes Curry's name and Jarrett's "does not, by itself, subject them to the ex parte rules applicable to this proceeding." (Comments at 2.) However, the Notice, which asked that they (and Liu) be placed on the service list together, implicitly links all of them with the stated reasons for the Water Division's participation:

The Water Division is aware of the utility's request and concludes that it would be useful to the Commission to have additional perspectives presented during the proceeding. Therefore, the Water Division's purpose in participating is to provide additional data that could assist the Commission in developing a well-informed record. (Notice at p. 1.)

The Notice does not distinguish Lui's role from that of Curry or Jarrett.⁴

⁴ I do not suggest that Water Division need designate, publicly, the advisors it may assign to a given formal proceeding. However, I believe that advocates must be identified in order to ensure the even-handed application of statute and the Commission's Rules.

Water Division's January 16, 2002 data request. Curry signed the data request, which Water Division tendered to the utility the same day as the PHC, and several months after the application was filed. The data request probes the substantive basis for the relief requested in the utility's application. At the PHC, staff counsel referred to this discovery as critical to the further development of the Water Division's position. (See Tr. at 5:1-22.)

The post-PHC meet-and-confer. The scoping memo confirms that, as ordered at the PHC, the purpose of the meeting (which occurred before the scoping memo issued) was to "clarify the Water Divisions' concerns, assist the utility in responding, and provide the information necessary to prepare this scoping memo." (Scoping memo at 3.) Water Division's Comments assert that Curry participated "solely for the reason that Mr. Jarrett could not attend" and allege that Curry's participation was advisory in nature. (Comments at 3.) Water Division does not explain how Curry's participation differed from that of Liu. Utility counsel's declaration alleges that Curry (not Liu), together with staff counsel, took the lead in the meeting. (Declaration at 4.)

Conclusion

Two of these three events--the Notice's service requests and Curry's attendance at the meet-and-confer--are ambiguous on their face. Without more, either reasonably could be interpreted as synonymous with advocacy *or* advisory participation. On the other hand, I believe that Curry's signature on formal discovery, issued three months after the filing of the utility application, must be interpreted as the action of an advocate. I conclude that Curry has been actively involved, in an advocacy role, in the shaping of the Water Division's position. I am concerned that the Commission not only conduct this formal proceeding fairly, but that it appear to do so, and consequently, the ex parte rules should

continue to apply to Curry. Jarrett has not been involved in the same, direct way, and I will modify my prior ruling to remove application of the ex parte rules to him.

IT IS RULED that:

1. The January 28, 2002, Scoping Memo and Ruling of Assigned Commissioner (scoping memo) is amended to remove application of the ex parte rules to Arthur B. Jarrett of the Commission's Water Division.

2. In all other respects, the scoping memo is affirmed.

Dated February 28, 2002, at San Francisco, California.

/s/ HENRY M. DUQUE

Henry M. Duque
Assigned Commissioner

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Amendment to January 28, 2002, Scoping Memo and Ruling of Assigned Commissioner on all parties of record in this proceeding or their attorneys of record.

Dated February 28, 2002, at San Francisco, California.

/s/ JACQUELINE GORZUCH
Jacqueline Gorzoch

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